

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of McLaurin/Bickley, Minors.

UNPUBLISHED

August 20, 2013

No. 313718

Genesee Circuit Court

Family Division

LC No. 11-127613-NA

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Respondent A. Romero appeals as of right from the trial court's orders terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (b)(ii), (g), and (j).¹ We affirm.

In March 2011, petitioner filed a petition to terminate the parental rights of respondent Romero and respondent W. Bickley to their child, WB, and to also terminate respondent Romero's parental rights to an older child, MM, at the initial dispositional hearing. The petition was filed after two-month-old WB was treated at a hospital for a combination of serious injuries that were indicative of child abuse. WB had attended a well-baby visit with his pediatrician on March 11, 2011, and appeared healthy and normal, except for a scratch on one leg that appeared to be infected, for which the doctor prescribed an antibiotic. WB returned for a follow-up appointment with his pediatrician four days later. At that appointment, the doctor observed that WB's eyes stared to one side instead of tracking faces and that he had a bulging fontanel. In addition, it was reported that he had been lethargic and his appetite was not normal. The child experienced two seizures in the doctor's office, after which he was transported by ambulance to a hospital where he was examined and given a CT scan, an MRI, an EEG, and a full-body x-ray. The tests revealed a skull fracture, bleeding in multiple areas of the brain, and bilateral retinal hemorrhages. The child also had metaphysal fractures in his legs, which occur from a twisting or pulling mechanism. The doctors who examined WB agreed that his combination of injuries

¹ Contrary to what respondent Romero asserts, the trial court did not terminate her parental rights under MCL 712A.19b(3)(k)(iii) and (k)(v). Although petitioner had additionally requested termination under those grounds, the trial court declined to rely on them as additional bases for terminating respondent Romero's parental rights.

could only be explained by non-accidental trauma that occurred within the previous 24 to 48 hours.

Workers from Child Protective Services (CPS) questioned respondent Romero and Bickley, who both reported that the child had continuously been with at least one parent during the relevant timeframe. They both suggested that the child's injuries were caused by a fall from a bed on March 2, 2011. Doctors determined that their explanation was inconsistent with the child's injuries.

While the petition involving WB and MM was pending, respondent Romero gave birth to a third child, WRB. Respondent Romero and Bickley had attempted to conceal WRB from petitioner, but he was eventually located and placed in foster care. Petitioner filed a second petition also requesting termination of respondent Romero's and Bickley's parental rights to WRB at the initial dispositional hearing.

Respondents Romero and Bickley thereafter both entered pleas of no contest to both petitions to allow the court to exercise jurisdiction over all three children. The court thereafter conducted a lengthy dispositional hearing. Petitioner's witnesses testified that WB's combination of injuries could only have been caused by intentional abuse. Respondents did not avail themselves of a medical expert appointed by the trial court, but they offered alternative explanations for the cause of WB's injuries. They suggested that WB sustained his injuries during the fall from a bed on March 2 and remained asymptomatic until March 13 or 14. They also suggested that WB's problems resulted from an adverse reaction to the antibiotic, although respondent Romero acknowledged that a drug reaction would not cause a skull fracture. Respondent Romero also testified regarding her Internet research on vitamin deficiency as a cause of brain injuries wrongly attributed to shaken baby syndrome. Respondents Romero and Bickley also both testified that they had a party at their home on the night of March 12-13, 2011. Bickley theorized that a guest at the party may have harmed WB, but respondent Romero did not believe that any of their guests would have abused a baby. Neither parent had mentioned the party to the police or CPS workers before the initial petition was filed.

The trial court declined to terminate respondent Romero's or Bickley's parental rights to the children under MCL 712A.19b(3)(k)(iii) or (k)(v), but found that termination of their parental rights was justified under MCL 712A.19b(3)(b)(i), (b)(ii), (g), and (j), and that termination was in the children's best interests.

I. JURISDICTION OVER MM

We initially address respondent Romero's argument that it was improper for the trial court to exercise jurisdiction over MM because he was placed with his father, against whom there were no allegations of abuse or neglect. This issue is unpreserved because the trial court's jurisdiction over MM was established by respondent Romero's plea of no contest to the initial petition, and respondent Romero did not attempt to withdraw her plea in the trial court. Cf. *In re Zelzack*, 180 Mich App 117, 126; 446 NW2d 588 (1989). Further, by affirmatively asserting that she was not contesting the court's exercise of jurisdiction over MM, respondent Romero waived any jurisdictional challenge. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (a waiver is the intentional relinquishment or abandonment of a known right). One who waives his

or her rights “may not then seek appellate review of a claimed deprivation of those rights.” *Id.* (citation omitted). Therefore, we reject this claim of error.

II. STATUTORY GROUNDS FOR TERMINATION

Respondent Romero argues on appeal that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence. In an action to terminate parental rights, the petitioner must prove by clear and convincing evidence the existence of at least one statutory ground for termination in MCL 712A.19b(3). MCR 3.977(A)(3) and (H)(3); *In re Trejo*, 462 Mich 341, 356; 612 NW2d 407 (2000). We review the trial court’s decision for clear error. MCR 3.977(K); *In re Trejo*, 462 Mich at 356. A finding of fact is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake was made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

The trial court terminated respondent Romero’s parental rights under MCL 712A.19b(3)(b)(i), (b)(ii), (g), and (j), which permit termination under the following circumstances:

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent’s act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent’s home.

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent’s home.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child’s age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child’s parent, that the child will be harmed if he or she is returned to the home of the parent.

The trial court erred to the extent that it terminated respondent Romero’s parental rights under § 19b(3)(b)(i). That subsection requires clear and convincing evidence that a parent’s act caused a physical injury or physical abuse. In its decision, the trial court stated:

As it relates to the statutory sections, while certainly the Department of Human Services might strongly argue that it was the act of mother and/or dad that caused these physical injuries, as to that part of it, there's just not sufficient evidence.

. . . there's just not sufficient evidence that they alone caused these physical injuries or . . . physical abuse.

Given the trial court's finding that the evidence was insufficient to show that respondent Romero caused WB's injuries, termination was not warranted under § 19b(3)(b)(i).

We also believe that termination was improper under § 19b(3)(b)(ii), which permits termination when a parent with the opportunity to prevent physical injury or abuse fails to do so and abuse is likely to recur. As previously indicated, the trial court found that the evidence was insufficient to identify respondent Romero as the person who abused WB. Thus, to the extent that Bickley or some other person may have been responsible for the abuse, termination of respondent Romero's parental rights under § 19b(3)(b)(ii) would be proper only if respondent Romero had the opportunity to prevent the abuse. Although petitioner presented evidence to support inferences that respondent Romero had knowledge of the cause of WB's injuries and concealed that information, those inferences do not permit the necessary additional inference that respondent Romero had the opportunity to prevent the abuse. Therefore, we believe that the trial court also erred in relying on § 19b(3)(b)(ii) as a basis for termination.

However, the trial court did not clearly err in finding that §§ 19b(3)(g) and (j) were both established by clear and convincing evidence. The medical evidence overwhelmingly established that WB sustained a combination of injuries that could only have been caused by intentional abuse. WB's injuries included a skull fracture that could have occurred no more than seven days before the x-ray was taken, bleeding in the brain that could not have started more than two days before, retinal bleeding, seizures that could not have started more than two days before, and metaphysial fractures, which result only from a twisting or pulling motion. Petitioner's expert, Dr. Brian Nolan, ruled out all reasonable alternative causes of the injuries. He acknowledged that medication side effects might cause seizures and an upset stomach, but denied that it could cause fractures and brain bleeds. The leg fractures were caused by a pulling or twisting mechanism, which would not result from a fall. Bruising and bleeding of the brain might result from severe trauma such as a high-speed automobile collision, but not from a fall off a bed. Dr. Ahmad Kaddurh agreed that multiple bleeds in the brain, contusions, a skull fracture, and retinal hemorrhaging were indicative of a non-accidental cause. Although respondent Romero offered other possible causes for the child's injuries, she was not a medical expert and she admitted that her theories did not account for the combination of WB's injuries. Thus, the trial court did not clearly err by failing to give weight to her lay opinions, or in finding that WB was subject to physical abuse while in the care of his parents.

Respondent refers to the trial court's statement that "someone needs to be held accountable" and argues that this statement indicates that the court sought to punish her and Bickley as scapegoats, notwithstanding the absence of evidence of their culpability. Read in context, however, it is apparent that the trial court found that someone must have physically abused WB, and that respondent Romero and Bickley knew who abused him, or how it

happened, because they both stated that one or both of them was constantly present with WB during the relevant timeframe. The trial court did not clearly err in inferring from the evidence that respondent Romero and Bickley were accountable for failing to supervise WB's contacts with other persons. Their refusal to reveal what they knew about WB's injuries made them culpable in protecting WB's abuser. The trial court did not clearly err in finding that respondent Romero was thus accountable for her role in WB's injuries, even if not as a direct perpetrator.

Respondent Romero's refusal to explain the cause of WB's injuries, and failure to confront the reality that she or another person violently abused WB, also supports the trial court's finding that she would not be able to provide proper care and custody within a reasonable time, because she is either unwilling or unable to protect her children from the risk of further abuse. Respondent Romero's decision to conceal the abuse instead of protecting her children also supports a finding that the children will likely be harmed if returned to her home. Although respondent Romero also argues that there was no basis to terminate her parental rights to MM because there was no evidence that he had ever been abused or neglected, the trial court was entitled to rely on the doctrine of anticipatory abuse or neglect to find that respondent Romero's conduct with respect to WB was probative of how she would treat her other children. *In re HRC*, 286 Mich App 444, 460-461; 781 NW2d 105 (2009); *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001). Accordingly, the trial court did not err in terminating respondent Romero's parental rights to all three children under §§ 19b(3)(g) and (j). See *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

III. BEST INTERESTS

Respondent Romero also argues that the trial court erred in finding that termination of her parental rights was in the children's best interests. Once a statutory ground for termination is established, the trial court shall order termination of parental rights if it finds, by a preponderance of the evidence, that termination is in the child's best interests. MCL 712A.19b(5); *In re Moss Minors*, ___ Mich App ___; ___ NW2d ___ (Docket No. 311610, issued 5/9/13), *slip op* at 6. This Court reviews the trial court's determination regarding a child's best interests for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009).

The evidence showed that respondent Romero was unwilling to acknowledge that WB had been intentionally abused, despite overwhelming evidence showing otherwise. Respondent Romero's denial prevented her from confronting the fact of child abuse and identifying the abuser. Respondent Romero's unwillingness to protect her children by naming the abuser placed them at a risk of harm in her care. Further, the evidence showed that respondent Romero did not fully acknowledge the extent and severity of WB's physical deficits and developmental delays associated with his injuries. Respondent Romero attempts to minimize the risk of abuse to MM by asserting that he is capable of reporting abuse. However, respondent Romero's denial of abuse as a cause of WB's injuries would still place MM at risk even if he was capable of telling her or another adult that he had been abused. Although MM's father was awarded custody of MM, allowing respondent Romero to retain her parental rights would leave MM at risk of abuse if Romero was granted parenting time. The trial court did not clearly err in finding that termination of respondent Romero's parental rights was in the children's best interests.

IV. FAILURE TO PROVIDE REUNIFICATION SERVICES

Respondent Romero argues that it was improper to terminate her parental rights without providing her with the opportunity to participate in reunification services. In general, petitioner must make reasonable efforts to rectify conditions, to reunify families, and to avoid termination of parental rights. See *In re Terry*, 240 Mich App 14, 25-26; 610 NW2d 563 (2000). MCL 712A.18f(2) sets forth petitioner's responsibility for preparing a case service plan before the court enters an order of disposition. The case service plan must include, among other items, a schedule of services that will be provided to the parent and child to facilitate reunification. MCL 712A.18f(3)(d). However, services are not mandated in all situations. *In re Plump*, 294 Mich App 270, 272; 817 NW2d 199 (2011). Petitioner is not required to provide services when termination of parental rights is the agency goal. *In re Terry*, 240 Mich App at 26 n 4. Further, reunification services are not required in cases involving severe physical abuse. See MCL 712A.19a(2) and MCL 722.638(1)(a)(iii). Here, petitioner requested termination of respondent Romero's parental rights at the initial dispositional hearing because WB had been severely physically abused. Under these circumstances, petitioner was not obligated to provide reunification services.

V. HEARSAY TESTIMONY

Respondent Romero lastly argues that the trial court erred in allowing a CPS caseworker to testify regarding statements made by MM during a forensic interview, during which MM reported that Bickley hit him with a belt and punched him and that respondent Romero "whopped" and swore at him. Although respondent Romero argued that the statements were inadmissible hearsay, the trial court ruled that the statements were not hearsay because they qualified as admissions of a party opponent under MRE 801(d)(2).

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). But evidentiary rulings are reviewed de novo to the extent that they require application of an evidentiary rule. *Id.* "Hearsay" is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Grissom*, 492 Mich 296, 325 n 3; 821 NW2d 50 (2012). Generally, "[h]earsay is not admissible except as provided by [the] rules [of evidence]." MRE 802. MRE 801(d)(2) provides that a statement is not hearsay if "[t]he statement is offered against a party and is (A) the party's own statement."

We agree with respondent Romero that MM's statements were not admissible under MRE 801(d)(2). At the termination hearing, MM was aligned with petitioner. Although the proffered statements were MM's own statements, they were not offered against MM, but rather against respondent Romero. Therefore, the trial court erred in admitting the statements under MRE 801(d)(2). However, we conclude that the error was harmless. "In civil cases, evidentiary error is considered harmless unless declining to grant a new trial, set aside a verdict, or vacate, modify, or otherwise disturb a judgment or order appears to the court inconsistent with substantial justice." *Guerrero v Smith*, 280 Mich App 647, 655; 761 NW2d 723 (2008) (internal quotation marks and citations omitted). MM's accusations against respondents were of minor significance in comparison to the evidence concerning WB's injuries. Moreover, the statements were relevant only to the issue whether MM was abused while in respondent's care. MM's

foster care worker testified at the termination hearing that there was no evidence that MM had been physically abused while in respondent Romero's care, and the trial court made no finding that MM had been abused. Indeed, the trial court did not reference MM's statements at all in either its summary of the evidence, or its analysis of the statutory grounds for termination or the children's best interests. Under these circumstances, refusal to set aside or disturb the trial court's decision is not inconsistent with substantial justice. Thus, the erroneous admission of MM's statements was harmless.

Affirmed.

/s/ Mark T. Boonstra

/s/ David H. Sawyer

/s/ Christopher M. Murray